

In The

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Supreme Court of the United States

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October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND
OILERS, LOCAL 112,*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Considering the important public policy in favor of requiring the safe transportation and distribution of natural gas, will this Court permit to stand undisturbed, the reluctant decisions of the United States Court of Appeals for the Third Circuit and of the United States District Court for the Western District of Pennsylvania, that those courts lacked the power — under decisions of this Court — to review and to set aside a voluntary labor arbitration award which ordered the reinstatement of a reckless employee who had been discharged for safety reasons for an irresponsible and dangerous act, in shutting off, contrary to standing orders, the main pipeline supply of natural gas to the Borough of Kane, Pennsylvania, during sub-zero weather and concealing that fact from his superiors, and thereby risking a catastrophe to the community?
2. Did the circuit court and the district court by their decisions to enter judgment upholding the award of the labor arbitrator, ignore the fact that the employer company is required to meet high standards of safety in the transportation and distribution of natural gas, which requirement would preclude the retention on the work force of a reckless employee whose conduct risked a catastrophe to the community?
3. Does the opinion and judgment of the circuit court upholding the labor arbitrator's award in this case amount to judicial condonation of illegal conduct, since the Company did show to the court, in its petition for rehearing en banc, that the reckless acts of the discharged employee constituted conduct prohibited by several sections of the Pennsylvania Crimes Code?
4. Will the decisions of the circuit court and the district court offend against public policy and cause the citizens of Kane and elsewhere to question the quality of judicial administration insofar

as those decisions require a small public utility gas company to rehire a reckless employee whom the company, in the interest of safety, had discharged?

5. Did the circuit court err in its conclusion that the labor arbitrator had not dispensed his own brand of industrial justice and err in its findings that the award had drawn its essence from the labor agreement, notwithstanding that the plain facts appearing in the circuit court's opinion compel the conclusion that the employee had been guilty of the reckless act of deliberately shutting off the main supply of natural gas to the community of Kane in sub-zero weather and concealing that fact from his superiors, which acts would justify his discharge by the Company?

6. Did the circuit court and the district court limit too narrowly their power of review over a labor arbitrator's award in accepting with approval the labor arbitrator's decision which placed the burden on the employer of producing conclusive evidence to support its charges that an employee was discharged for proper cause?

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KANE GAS LIGHT AND HEATING COMPANY,

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INTERNATIONAL BROTHERHOOD OF FIREMEN AND
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Kane Gas Light and Heating Company prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 12, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported in 687 F. 2d 673 (1982) and appears in Appendix A at pages 1a to 21a.*

* The pagination of the Appendices will be sequential and cumulative. All page reference will be abbreviated "1a", "2a", "3a", etc., regardless of which Appendix contains the material cited.

The order of the court of appeals denying the petition for rehearing en banc appears in Appendix C at page 50a.

The opinion and order of the United States District Court for the Western District of Pennsylvania appears in Appendix B at pages 22a to 35a.

The opinion and award of the arbitrator which is the subject of this action, appears in Appendix D at pages 52a to 63a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered August 12, 1982. A timely petition for rehearing en banc was denied on September 10, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved in this case is in Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), which provides as follows:

- (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In addition to the foregoing, the following statute and regulations are involved:

1. United States Department of Transportation Regulations "Minimum Safety Requirement for Pipeline Facilities and the Transportation of Gas", 49 CFR §192.623(b) (enacted pursuant to provisions of the National Gas Pipeline Safety Act of 1968, 49 U.S.C.A. §1672). This regulation appears in Appendix C at page 41a.
2. Public Utility Code of Pennsylvania, Title 52 Pa. Code §59.33(a) and (b). Those provisions appear in Appendix C at page 41a.
3. Pennsylvania Crimes Code, 18 Purdon C.P.S.A. §§2705, 3302, 3303 and 3304. Those provisions appear in Appendix C at pages 42a-44a.

STATEMENT OF THE CASE

Petitioner Kane Gas Light and Heating Company is a small company with a total employment of twenty persons. Nine of those employees are members of respondent union and they constitute the field workers, who, under the supervision of two foremen, are charged with assisting in the safe and dependable operation of over two hundred miles of natural gas distribution lines. The Company furnishes natural gas to approximately 3,200 customers in the Boroughs of Kane and Mt. Jewett, Pennsylvania. In addition to households, the customers include factories, commercial establishments, hospitals, schools and housing for senior citizens.

The Company is a public utility and is subject to regulation by the Pennsylvania Public Utility Commission and is required to provide safe and adequate service to its customers. The

Company is subject to the provisions of the United States Department of Transportation Regulations, promulgated under the Natural Gas Pipeline Safety Act of 1968.

The flow of gas into the Borough of Kane in 1979 was controlled by a system of valves at the Borough of Mt. Jewett (nine miles away) at a regulator station. Pritchard, a resident of Mt. Jewett, had been an employee of the Company as a field worker for seven years and only upon instructions from his supervisors, opened and closed valves at that station. Communication was maintained by radio and telephone contact. This station had two principal valves. One was a "by-pass valve", which when turned on bypassed the restrictive effect of the regulators and when opened it increased the gas flow when so required at Kane. The other was a shut-off valve, the main valve, which was used only if it became necessary for shutting off the entire gas supply through one of the transmission lines to Kane. It was shut off only to permit necessary repairs to that transmission line. The valves were not similar, nor located in close proximity. The separate function of each valve was well known to Pritchard.

On the morning of February 9, 1979, when the temperature stood at ten degrees below zero Fahrenheit, Pritchard was instructed to open the by-pass valve by a specific order from the foreman, to increase the flow of gas to Kane due to the extremely cold weather. By eleven o'clock that morning, the gas pressure at Kane had come back to its normal level, and the foreman at Kane ordered Pritchard at Mt. Jewett to close the by-pass valve. However, Pritchard, when he returned to the station, shut off not only the by-pass valve, but he also closed the main valve. He reported back to his foreman in Kane that he had closed the by-pass valve, but he concealed the fact that he had closed the main valve. Closing the main valve effectively cut off most of the gas being transported from Mt. Jewett to the Borough of Kane when the temperature stood at about zero. The supervisor and

the foreman in Kane fortunately noted the drop in gas pressure in Kane and being unable to reach Pritchard by radio or telephone, the foreman drove to the valve station to seek out the reason for the loss of gas supply. The foreman discovered that the main valve was closed and he immediately reopened that valve and increased the gas supply to Kane. Later Pritchard told the supervisor he had closed the main valve because he thought Kane didn't need the gas. Considering the severity of the weather, Pritchard's actions in closing the main valve and concealing that fact caused a high risk and danger to life as well as substantial property damage.

Because of the serious consequences which could have directly resulted from Pritchard's conduct, the Company decided, after reviewing all of the circumstances surrounding the shutting off of the main valve, that there was proper cause to discharge Pritchard. It was the unanimous opinion of the two foremen, the supervisor, the manager and the officers of the Company that he should be discharged for reasons of safety, because his continued employment would not be consistent with the obligations to conduct its operations in a safe manner and without a threat to the safety of the community. The Company premised its decision to discharge Pritchard under Article 1, Section 1 of its Collective Bargaining Agreement with Local 112, which provides:

The Company retains the right to manage its operations and its direction of the work forces, including the right to make rules and regulations; hire, suspend, discharge for proper cause; . . .

Pritchard's actions, according to the Company, constituted irresponsible insubordination, sabotage, and deliberate restriction of output. Under the Company's "Rules of Conduct for Union Employees", each of these violations carried a maximum penalty of discharge for the first offense.

After Pritchard was fired, the union filed a grievance on his behalf. Subsequently, the president of the Company met with Pritchard and a union representative to discuss the matter further. At that meeting, however, Pritchard failed to give any explanation whatsoever as to why he had closed the main valve. After further review, therefore, the Company reaffirmed its decision to discharge Pritchard for safety reasons.

The union continued to contest the Company's action, and eventually both the Company and the union agreed voluntarily to submit the dispute to arbitration by the American Arbitration Association. This step was taken despite the absence of any provision for arbitration of grievances in the Collective Bargaining Agreement. Both the union and the Company agreed that the question submitted to the arbitrator was whether Pritchard was discharged for proper cause within the meaning of the parties' Collective Bargaining Agreement as well as the Company's Rules of Conduct. The sole question submitted to the arbitrator was "whether the grievant was discharged for proper cause?"

After a hearing, the arbitrator found that Pritchard had acted "errantly, beyond his assigned authority, and beyond the scope of his foreman's orders" and that Pritchard's actions warranted a severe penalty. Concluding that the record established that Pritchard's actions constituted "reckless inadvertence", the arbitrator ordered that Pritchard be reinstated with back pay, with the reinstatement order to take effect thirty days following Pritchard's date of discharge. He further ordered that the period running from the date of discharge to the date of reinstatement be treated as a disciplinary suspension.

Because the Company believed the award was erroneous, the Company brought this action in the district court on April 9, 1980, seeking an order upholding the discharge of Pritchard and vacating the arbitrator's award for manifest disregard of the law and facts.

The union filed a counterclaim, seeking enforcement of the arbitrator's award. Emphasizing the very limited power of judicial review of labor arbitration awards, the district court declined to vacate the award and entered summary judgment for the union on December 19, 1980. The Company then took an appeal to the circuit court and the court of appeals affirmed the district court's order on the grounds that it lacked the power to set aside the award in this case. Thereafter, in response to a point on "Public Policy" specifically raised in the opinion of the court of appeals, the Company filed a petition for rehearing en banc in support of its contention that the award was contrary to Public Policy. That petition detailed those provisions of the Pennsylvania Crimes Code which prohibit reckless conduct such as the court had found the employee had engaged in. The court denied the petition for rehearing en banc without opinion or comment on the content of the petition.

REASONS FOR GRANTING THE WRIT

I.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented in the matter of judicial administration, namely — should the relative rank of importance to the commitment to finality of labor arbitration awards be more important than the requirements for public safety in the transportation and use of natural gas as dictated by federal and state laws and regulations.

The circuit court held that it and the district court lacked the power to review and set aside an arbitrator's award which ordered the rehiring of an employee who had been discharged for reckless conduct which risked catastrophe to the community.

All of the judges below expressed on the record their uneasiness and discomfort with the decisions they felt obliged to reach in this case.

Judge Knox for the district court stated (33a):

The Court has reluctantly come to the conclusion that it has no power to disturb the arbitrator's award. Lingering in the court's mind is the question of what would have been done in this case had numerous explosions with resulting deaths occurred as a result of this action? What should be the penalty? Under the rules laid down, however, we have no right to speculate or interfere in this determination.

Judge Garth for himself and Chief Judge Seitz, speaking for the majority of the panel for the circuit court stated (2a):

In this appeal we are asked by the Kane Gas Light and Heating Company ("the Company") to vacate an arbitrator's award which, after imposing relatively minimal sanctions, reinstated an employee whom the Company had discharged. Were we to sit as the initial factfinders in determination of whether Alan Pritchard, the employee, should be discharged, we would be hard pressed to justify his re-employment. In fact, however, the scope of our review in this case is an exceedingly narrow one, and employing that standard, we conclude that we are obliged to enforce the arbitrator's award, whatever misgivings we may have about its merits or wisdom.

Judge Adams of the circuit court panel, in his concurring opinion stated (20a):

Judge Garth has aptly set forth the exceedingly narrow standard to which we must adhere in reviewing the arbitrator's decision. Applying this standard, Judge Garth concludes — correctly, I believe — that this Court is without power to disturb the arbitrator's findings and conclusions. Regardless of how impeccable this analysis may be from a legal perspective, however, I have no doubt that the citizens of Kane when they learn of our decision will be astonished at the result. While we may justify our decision as reflecting a national commitment to arbitration, or perhaps simply as the inevitable outgrowth of a line of judicial precedent, the fact remains that today we condone the reinstatement of a person whose actions advertent or not, very nearly had disastrous consequences.

If the judges felt that their decisions would astonish the citizens of Kane, the Company suggests, that they had the inherent power and duty to set aside the award and to protect the safety of the citizens of Kane on the ground that the award could not legitimately draw its essence from the labor contract and was contrary to public policy as being contrary to the requirements of federal and state laws and regulations.

The circuit court failed to apply the standards of review established in the decision of *United Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) and unduly broadened the unreviewable power of the labor arbitrator.

The national commitment to a narrow standard of judicial review of labor arbitrator's awards does not justify the refusal by the courts below to review and set aside an arbitrator's decision which ordered the petitioner, a small natural gas public utility, to rehire a discharged employee whose reckless conduct had risked a catastrophe to the community.

The employer Company must meet high standards of safety in the transportation and distribution of natural gas. Those standards would preclude the retention of reckless employees on the work force.

The judgment of the circuit court, if not set aside, will threaten the ability of the Company to comply with the safety requirements of the Public Utility Code of Pennsylvania, the Regulations of the United States Department of Transportation and the duties of care imposed upon a gas company by the courts.

The Company is subject to the requirements of the Pennsylvania Public Utility Commission, set forth at page 41a of the Appendix, and of the United States Department of Transportation Safety Regulations, set forth on page 41a of the Appendix.

The nature of care required by a gas company and its employees is set forth in the recent decision by Judge Weber in the Western District of Pennsylvania of *Karle v. National Fuel Gas Dist. Co.*, 448 F. Supp. 753 (W.D. of Pa. 1978). The court there carefully reviewed in detail the duties of care imposed upon a gas company at pages 759 and 760. The court states:

In delimiting the duty of care of gas and electric companies, Pennsylvania courts have emphasized the extreme dangers that elements like gas and electricity present. "Where explosive compounds

are in play, the measure of care arises with the degree of hazard involved." *Hemrock v. Peoples Natural Gas Co.*, 423 Pa. 259, 223 A. 2d 687, 692 (1966). The power of uncontrolled gas and electricity to destroy and disfigure is so great, that upon their purveyors the law imposes the "highest standard of care practicable." *Densler v. Metropolitan Edison Electric Co.*, 235 Pa. Super. 858, 345 A. 2d 758, 761 (1975), quoting with approval *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. 540, 543, 50 A. 161-2 (1901).

II.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented as to whether the opinion and judgment offends common sense and serious public policy for safety — in forcing a public utility gas company to rehire a reckless employee whose deliberate conduct and concealment of that conduct risked a catastrophe to an entire community.

The opinions of the courts below, in denying their power to vacate the arbitrator's award, would require the Company to rehire an employee whose conduct violated several provisions of the Pennsylvania Crimes Code, which are set forth on pages 42a-44a of the Appendix. They relate to — causing or risking catastrophe, failure to prevent catastrophe, criminal mischief and recklessly endangering another person.

Those sections of the Penal Code are an expression of the modern concern of the Legislature of Pennsylvania for the danger which may threaten the general public from present day potential harm from public catastrophe.

The type of public danger with which the Commonwealth of Pennsylvania was concerned with in the passage of the above cited sections of the Penal Code was the risk of catastrophe to which the reckless employee caused to citizens of Kane, Pennsylvania.

Even without the authority of legislative statutes, public policy as defined by the courts should be heeded in evaluating the effects of the decision by the circuit court in this case.

Public policy has been defined in Pennsylvania in the opinion of Judge Gourley in *McGee v. McNany*, 10 F.R.D. 5 (U.S.D.C. of W.D. of Pa. 1950), at page 12:

What is public policy? It has been defined in Pennsylvania — "public policy" means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy. *Goodyear v. Brown*, 155 Pa. 514, 518, 35 Am. St. Rep. 903 (1983).

This Court has stated in *Building Service Employees International Union, Local 262 v. Gazzam*, 70 S. Ct. 784, 787, 339 U.S. 532 (1950), that:

The public policy of any state is to be found in its constitution, acts of the legislature, and decision of its courts.

This Court has also stated the meaning of public policy in *Beasley v. Texas & P.R. Co.*, 191 U.S. 492 (1903), as:

The very meaning of "public policy" is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.

III.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented as to whether the opinion and judgment will result in placing a heavy and dangerous burden upon both interstate and intrastate commerce if arbitrators, district courts and circuit courts may force a public utility gas company to rehire reckless employees whose conduct threatened the safety of a community.

It is quite apparent that if the petitioner Company with a work force of eight men was required to rehire the employee as ordered by the circuit court, then the Company will be burdened with the obligation to do something more than it is doing now to protect its customers, its other fellow employees and the citizens of Kane and Mt. Jewett.

Frankly, the Company does not know what it should do. It is a unique problem with which the Company should not be burdened. Admittedly, the problems of the petitioner won't cause a ripple on the national picture. However, the legal precedent in this case that the need for safe operation of a public utility gas company must give way to a higher need to rehire a reckless employee, is strange and frightening indeed.

The small utility would find it almost impossible to rehire a reckless employee and at the same time prevent him from having access to the equipment and valves which could endanger the community. A large company would still find a serious problem in guarding against repetitious and dangerous recklessness. If a catastrophe did occur, the burden and cost to the community,

as well as to the industry, could be ruinous, in both lives and property. In the natural gas industry these additional costs would be an additional burden on the customers who depend on the industry for their heat and other services. These costs are already high and it would be a great and unwelcome burden to unnecessarily increase them further.

IV.

This Court should review the opinions of the circuit court and the district court because a serious question is presented as regards the administration of justice as to whether their opinions and judgments gave judicial condonation to the arbitrator's requirement that the Company employer produce conclusive proof to support its charges that an employee was discharged for proper cause.

The district court in its opinion (25a) stated:

The arbitrator found (p. 5 of the award) "based on the foregoing it is found that the company has failed to adduce evidence which would support its charges in this matter. Absent is any *conclusive evidence of motivation* on the part of the grievant (Pritchard) to intentionally sabotage the company by deliberately restricting the flow of gas." *Thus, the arbitrator found that there was no evidence which would constitute proper cause under Article One, Section 1 of the contract for discharge. The burden, of course, was on the company to prove the reasons for its actions. (Emphasis supplied.)*

Article One, Section 1 of the Labor Contract appears in the district court's opinion (24a) and in the circuit court's opinion (4a) and states in relevant part:

The Company retains the right to manage its operations and its direction of the work forces, including the right to make rules and regulations; hire; suspend; discharge for proper cause; . . .

Objection was noted by the Company with the district court's approval of the "conclusive proof" of evidence standard used by the arbitrator and this point was covered in its brief filed with the circuit court of appeals. The Company in its brief pointed out that the parties had stipulated at the outset of the arbitration hearing that —

the burden, in a discharge case is upon the Company to demonstrate that by a preponderance of the evidence the discharge is warranted.

Notwithstanding the objection the Company made on appeal to the circuit court, that court ignored the objection without comment whatsoever.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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